IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of: Weers et al. Application No: 10/751,342 Confirmation No: 7605 Filed: December 31, 2003 Title: AEROSOLIZABLE PHARMACEUTICAL FORMULATION FOR FUNGAL INFECTION THERAPY	Group Art Unit: 1617 Examiner: Carter, Kendra D Attorney Docket No: 53311-US-CNT (NV.0190.00) April 1, 2011 San Francisco, California

REPLY BRIEF

VIA EFS

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Examiner:

In response to the Examiner's Answer mailed on February 1, 2011 and corrected on February 16, 2011, the Applicant of the above-referenced patent application (hereinafter Appellant) hereby maintains the appeal to the Board of Patent Appeals and Interferences. Appellant requests the reversal of the Final Rejection.

Certificate of Transmission

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By: Melanie Hitchcock
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Date: April 1, 2011

Status of Claims

Claims 1-15, 18-20, 23-25, 28-31, 38-40, 63-78, 98, 99 and 101 are presently pending in the case. Claims 1-15, 18-20, 23-25, 28-31, 38-40, 63-78, 98, 99 and 101 have been finally rejected. The rejection of each of claims 1-15, 18-20, 23-25, 28-31, 38-40, 63-78, 98, 99 and 101 is hereby appealed.

Claims 16, 17, 21, 22, 26, 27, 32-37, 41-62, 79-97 and 100 have been cancelled.

Grounds of Rejection to be Reviewed on Appeal

Appellant continues to request review of the Examiner's following grounds of rejection:

Claims 1-15, 18-20, 23-25, 28-31, 38-40, 63-76, 98, 99 and 101 have been rejected under 35 U.S.C. §103(a) as being unpatentable over US Patent Application 2002/0177562 to Weickert et al (hereinafter Weickert et al) in view of U.S. Patent 6,395,300 to Straub et al (hereinafter Straub et al).

Claims 1-15, 18-20, 23-25, 28-31, 38-40, 98 and 99 have been provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 23-25, 27-30 and 35-44 of co-pending Patent Application No. 11/187,757 (hereinafter '757 Application).

Claims 77 and 78 have been rejected for unknown reasons.

Argument

Appellant believes each of claims 1-15, 18-20, 23-25, 28-31, 38-40, 63-78, 98, 99 and 101 is improperly rejected and is therefore allowable for the reasons set forth in Appellant's Appeal Brief filed on November 24, 2010. The present Reply Brief is being filed to specifically address some of the issues raised by the Examiner in the Examiner's Answer mailed on February 1, 2011 and corrected on February 16, 2011. The comments herein are merely supplemental to the arguments made in the Appeal Brief and are not meant to replace those arguments.

The rejections under §103(a) are improper

The Examiner's rejection of independent claim 1, for example, under 35 USC §103(a) as being unpatentable over Weickert et al in view of Straub et al continues to be improper and should be reversed.

As discussed in the Appeal Brief, claim 1 is not rendered unpatentable by Weickert et al and Straub et al for at least three reasons, any one of which would be enough to negate the Examiner's improper conclusion of obviousness. These reasons will be briefly summarized.

Firstly, Wieckert et al fails to disclose and the Examiner fails to appreciate all that is recited in claim 1. Specifically, claim 1 requires maintaining a certain level of pharmaceutical formulation in the lungs for a period of one week. Weickert et al discloses the administration of a medicament for over a week but does not disclose maintaining the level in the lungs for over a week. Instead, in the regimen taught by Weickert et al, the lung level would spike up and down, thereby at times falling below the level required by claim 1.

Secondly, Weickert et al fails to disclose two different dosages that are administered over a period of time. The Examiner points to portions of Weickert et al that discuss determining a dose based on age, weight, etc. While it is true that one dose may be given to one patient and a second dose may be given to a second patient, that doesn't meet the limitations of claim 1 which requires different dosages be given to the same patient during the same therapeutic treatment.

Thirdly, it would not have been obvious to combine the teachings of Staub et al with the Wieckert et al disclosure for several reasons, as discussed in the Appeal Brief.

In the Examiner's Answer of February 1, 2011 and corrected on February 16, 2011, the Examiner adds no new arguments concerning issues (1) and (3), but does add a new argument concerning issue (2) on the paragraph bridging pages 13 and 14. Here the Examiner appears to contend that one of ordinary skill in the art would have found it obvious to combine Wieckert et al with Appellant's claims. However, Appellant's claims are not prior art, and it is improper for the Examiner to use them as a teaching reference to modify Weickert et al. At the very least, this amounts to improper hindsight reasoning, absent any suggestion in the prior art to make the modification purported to be obvious.

The Examiner also adds new grounds of rejection for claims 77 and 78. However, Appellant rests on the fact that claims 77 and 78 depend from allowable claim 63 and are therefore allowable for at least the same reasons as the claim from which they depend.

Conclusion

Thus, it is believed that all rejections made by the Examiner have been addressed and overcome by the above arguments and the arguments provided in the Appeal Brief. Therefore, all pending claims are allowable. A reversal is respectfully requested.

Should there be any questions, Appellant's representative may be reached at the number listed below.

Respectfully submitted,

JANAH & ASSOCIATES

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